S.B.Civil Second Appeal No.100/2001.

Jagdish Chandra
vs.
Bhanwar Lal.

DATE OF JUDGMENT ::: 22.3.2007

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr.RR Nagori a/w Mr.A Agarwal, for the appellant.
Mr.MS Panwar a/w Mr.S Singh, for the respondent.

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BY THE COURT:

Heard learned counsel for the parties.

The plaintiff/respondent filed a suit for eviction of tenant/appellant/defendant on the grounds of default, subletting of suit premises to two sub-lettes – Mewa Ram and Kailash Chandra, material alteration in the suit premises and also sought fixation of standard rent for the suit premises.

The defendant's contention was that the defendant never subletted the suit premises to Mewa Ram and Kailash Chandra. Kailash Chandra is brother of defendant/appellant. The appellant has not committed any default nor he has made any material alteration in

the suit premises. The defendant also contested the issue of fixation of standard rent for enhancement of rent.

The trial court dismissed the suit of the plaintiff for eviction of tenant after giving benefit of first default to the tenant and after deciding the issue of subletting and material alteration against the plaintiff. However, the trial court fixed the standard rent of the suit premises as Rs.375/- per month.

The judgment and decree of the trial court dated 11.12.1996 was challenged by the plaintiff as well as defendant by two appeals which are civil appeal no.3/1997 and 6/1997. The first appellate court dismissed the appeal no.6/97 of the defendant and allowed the appeal no.3/1997 of the plaintiff. The first appellate court reversed the finding of trial court on issue no.2 and held that the plaintiff proved the case of subletting so far as subletting to Mewa Ram is concerned. The first appellate court upheld the finding of the trial court against the plaintiff about subletting to defendant's brother Kailash Chandra. The first appellate court also upheld the finding of the trial court against plaintiff about allegation of material alteration. The first appellate court further enhanced the standard rent and fixed it as Rs.500/- per month against enhancement of rent to Rs.375/- as enhanced by the trial court.

Hence, this second appeal by the defendant/ appellant/tenant.

Learned counsel for the appellant vehemently submitted that firstly the pleading about subletting was not complete, therefore, the court below should not have decreed the suit on the ground of subletting. It is also submitted that the plaintiff has not pleaded material facts about subletting in as much as, he has not disclosed the consideration for creation of tenancy nor he has pleaded that the defendant lost his possession over the suit property and the sublettees are in exclusive possession of the suit property. Learned counsel for the appellant also submitted that it is the duty of the landlord to plead and prove two ingredients of subletting – firstly parting with possession and secondly, consideration of subletting. Learned counsel for the appellant in this regard relied upon the following judgments of Hon'ble Supreme Court, which are :- AIR 1984 SC 1447 – Jagdish Prasad vs. Smt. Angoori Devi ; (1998) 6 SCC 573 – Kala & Anr. vs. Madho Parshad Vaidya ; (1999) 7 SCC 263 – Resham Singh vs. Raghvir Singh & Anr. and (2000) 7 SCC 522 – Shama Prashant Raje vs. Ganpat Rao & ors.

Learned counsel for the appellant also submitted that the first appellate court has not considered and reversed the reasons given by the trial court and when

the trial court has recorded cogent reasons, then the jurisdiction of the first appellate court was limited as held by the Hon'ble Supreme Court in the case of S.V.R. Mudaliar (dead) by LRs. & Ors. vs. Mrs. Rajabu F. Buhari (dead) by LRs. & Ors reported in AIR 1995 SC 1607.

I considered the submissions of learned counsel for the parties and perused the reasons given by the two courts below.

The trial court considered the evidence of both the parties and held that the plaintiff failed to prove subletting of the suit premises to the alleged sublettees - Mewa Ram and Kailash Chandra. Kailash Chandra is none else then the brother of appellant/tenant and that fact was also a weighty factor for the appellate court for holding that Kailash Chandra is not sublette. For Mewa Ram, the trial court observed that the plaintiff failed to prove the consideration of creation of tenancy in favour of Mewa Ram by the tenant in chief. It is also observed by the trial court that Mewa Ram is not in exclusive possession of the suit premises or part of the suit premises. The trial court accepted the contention of the defendant that Mewa Ram was servant working in the shop for tenant. The first appellate court considered

the evidence and observed that firstly, the suit premises was taken on rent for running the business of clothes and not of garments. The defendant's case was also not that he was doing the business of stitch clothes or selling of garments. Whereas Mewa Ram admittedly was doing the stitching work, therefore, that was the work of independent nature. The first appellate court also considered the statement of defendant's witness Manak Chand who stated that Mewa Ram is doing business of repairing of cooler and fans in one portion of the shop. The defendant could not produce any trustworthy evidence to prove that Mewa Ram is his tenant. He even did not produce Mewa Ram in evidence.

It is true that the ingredients for proving subletting are well known and the landlord is required to plead and prove the facts that over the suit premises or part of the suit premises, the tenant lost his possession and handed it over to a stranger and that makes parting of possession but for creation of tenancy, the contract between tenant and sub-tenant for consideration is necessary. These all ingredients are required to be proved by the landlord.

In civil cases, initial burden for negative issue can be discharged by mere word of mouth, then onus

shifts on the other party to disprove or explain the facts so as to avoid the finding against himself. It cannot be disputed that a contract between two individuals is normally not in the knowledge of a person who if will get the knowledge of such contract which may give advantage over the contracting parties, then he with his own limitation can draw presumption of contract from the facts and can reach to the conclusion that a contract has been entered. Once the presence of third party in the rented premises is proved or admitted, then onus shifts on the defendant to explain the presence of third party. The consideration is also secret contract when it is having adverse consequences if comes to knowledge of other person than it is very difficult for that person, in present facts of case, the landlord to prove the actual consideration for the contract which may be written or oral and also difficult to prove the actual payment and receipt of the consideration by the sub-tenant to the landlord. In such circumstances, inferences can be drawn from the facts.

It cannot be presumed to be a gratuitous act of the tenant of putting someone else in the rented premises for which he is paying rent. In the present case, it is not a gratuitous act of the defendant tenant because of the fact that the tenant himself has admitted that Mewa Ram was servant of tenant then to

prove that contract, consideration was most important ingredient for which the defendant did not produce the books of accounts to prove this fact. Assuming for sake of arguments that there was no books of accounts then also, it was duty of the defendant/tenant to prove this fact that the person who is in occupation and not family member of tenant, then under which status and capacity, he was in occupation of the suit premises. For this, he could have produced other evidence also but there is no other evidence. Apart from it, the defendant did not produce said Mewa Ram as his witness despite the fact that, according to him, he worked in the shop for about 5-7 years and admittedly the suit was filed within three years from the entry of Mewa Ram in the shop. It is true that the first appellate court and the trial court have not drawn adverse inference against the defendant on this count but it should have been because of the reason that in a case of tenancy, there is a restriction against the tenant of even parting with possession of the suit property or its part and further against subletting of the suit premises, then on presence of third party in the rented premises, the landlord can reasonably draw inference either of parting with of the suit property or subletting of the suit property by tenant. The tenant got full opportunity to contest the issue and after getting opportunity to explain all the facts and

circumstances to explain the presence of third party in the suit shop as a person lawfully entitled to remain in possession of the suit property, then it is too much to expect direct evidence on this issue from the landlord to prove the actual consideration between the tenant and sub-tenant.

So far as the exclusive possession of Mewa Ram is concerned, the plaintiff stated that the tenant is not residing in the town and one part of the suit premises has been given to Kailash Chandra and another part to Mewa Ram. Not only this but after dividing the shop in two portions, then if Kailash Chandra was found to be in possession of the suit property on behalf of the tenant and other part is in possession of one Mewa Ram, then it is not a case of no evidence or evidence which could not have been sufficient evidence for reaching to the conclusion of parting with the suit premises and handing it over to the sub-tenant.

Learned counsel for the appellant tried to convert the question of fact to question of law very ably but on scrutiny, I find it to be a question of fact only. I do not find any reason to interfere in second appeal as even if there is other view possible of this Court, then there is no reason to interfere in the finding of fact recorded by the first appellate court as the first

appellate court being final court of recording finding of fact and has considered the evidence of the case.

In view of the above, I do not find any substantial question of law involved in this appeal and this second appeal deserves to be dismissed.

At this stage, learned counsel for the appellant prayed that the appellant may be granted three years' time to vacate the suit property.

Learned counsel for the respondent vehemently submitted that the first appellate court passed the decree in 2001 and more than six years had passed, therefore, no further time may be granted to the appellant.

I considered this prayer of learned counsel for the appellant and looking to the facts of the case, this Court is of the view that the appellant be granted time upto 31.3.2008 to vacate the suit premises.

Therefore, it is ordered that in case, the appellant furnishes a written undertaking before the trial court within a period of two months from today that he shall hand over the vacant possession to the landlord by or before 31.3.2008 and shall not part with the possession or sublet the suit premises during this

period and shall pay all the arrears of rent and decreetal amount, if due, within a period of two months from today before the trial court or directly to the landlord, the decree under challenge shall not be executed till 1.4.2008. The appellant shall also deposit the rent month by month by 15th day of each succeeding month of his tenancy in the trial court or pay directly to the landlord.

In case of non-compliance of the order or default in payment of rent mentioned above, the decree shall become executable forthwith.

With the aforesaid concession, this appeal is dismissed.

(PRAKASH TATIA), J.

S.Phophaliya